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Yee Cheong Seng v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–78 OF 2009
ZALEHA ZAHARI, CLEMENT SKINNER AND BALIA YUSOF JJCA
14 JUNE 2011

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Criminal Law — Dangerous Drugs Act 1952 — s 12(2) — Possession of dangerous drugs — 6.58g of methamphetamine — Appeal against conviction and sentence — Drugs found in appellant's car and inside the appellant's hotel room — Whether appellant had custody, care and control of drugs — Whether story about existence of a third person was mere fabrication — Whether element of knowledge proved — Defence of bare denial

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking 191.65g of methamphetamine — Appeal against conviction and sentence — Drugs found in appellant's car and inside appellant's hotel room — Whether appellant had custody, care and control of drugs — Whether story about existence of a third person was mere fabrication — Whether element of knowledge proved — Defence of bare denial

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Upon receiving information about drug trafficking activities by a Chinese man near Sunday Hotel using a Proton Waja car ('the car'), PW3 and PW2 carried out surveillance at the said Sunday Hotel. At about 1.00am, the appellant arrived, driving the car. He alighted from the car and went into Sunday Hotel carrying a brown sling bag. At about 7.00am, when the appellant came out of the hotel and entered the car he was detained by the police. A body search conducted on the appellant did not produce anything incriminating. The appellant appeared frightened. A search of the car revealed drugs kept under the steering dashboard. PW3 then recovered a key for room No 201 of Sunday Hotel from the appellant. A search of the hotel room also revealed drugs inside the brown sling bag. The appellant was charged for possession of 6.58g of methamphetamine contrary to s 12(2) of the Dangerous Drugs Act 1952 ('the Act') and for trafficking of 191.65g methamphetamine contrary to s 39B(1)(a) of the Act. The appellant in his defence claimed that he had arrived at Sunday Hotel with a friend named Ah Chiang who had driven the car and picked the appellant up earlier at Larkin bus station. The appellant claimed that when he woke up the next morning, he could not find Ah Chiang. The appellant then took the car to go for breakfast when he was arrested. The appellant denied knowledge of the drugs. The judicial commissioner ('JC') ruled that the appellant's story about 'Ah Chiang' was a mere fabrication unsupported by evidence. The JC then made a finding of fact that the appellant had knowledge

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of the incriminating drugs. The High Court thus found the appellant guilty of both charges. Hence this appeal by the appellant.

Held, dismissing the appeal:

(1) Reading PW2, PW3 and PW5's evidence as a whole, the court was satisfied that the appellant had been sufficiently identified as the Chinese man arriving in the car at the Sunday Hotel, was the same person leaving the hotel the following morning, then entering the said car in which the drugs was recovered. There was no reason to disbelieve PW2, PW3 and PW5 (see para 18).

(2) The appellant was in actual possession of the drugs recovered from the car as well as that recovered in the room No 201 Sunday Hotel. The JC was also right in inferring that the appellant had knowledge of the drugs recovered in the said car and that from the sling bag in the hotel room occupied by him. The learned judge's rejection of the story of the presence of a friend named Ah Chiang being together with the appellant that night to be a mere fabrication was, in these circumstances, correct (see para 20).

[Bahasa Malaysia summary

Selepas menerima maklumat mengenai aktiviti pengedaran dadah oleh lelaki Cina berhampiran Sunday Hotel yang menaiki kereta Proton Waja ('kereta'), PW3 dan PW2 menjalankan pengawasan di Sunday Hotel tersebut. Lebih kurang pukul 1.00 pagi, perayu tiba dengan memandu kereta tersebut. Dia turun daripada kereta dan masuk ke dalam Sunday Hotel dengan menggalas beg galas berwarna perang. Lebih kurang pukul 7.00 pagi, apabila perayu keluar daripada hotel dan memasukki kereta dia ditahan oleh polis. Pemeriksaan badan dijalankan ke atas perayu tidak menunjukkan apa-apa yang membuatkan seseorang itu besalah. Perayu nampak takut. Pemeriksaan kereta menunjukkan dadah disimpan di bawah papan pemuka stereng. PW3 kemudiannya menemui kunci untuk bilik No 201 Sunday Hotel daripada perayu. Pemeriksaan ke atas bilik hotel tersebut juga menunjukkan terdapat dadah di dalam beg galas berwarna perang. Perayu dituduh memiliki dadah *methamphetamine* 6.58g bertentanggan s 12(2) Akta Dadah Berbahaya 1952 ('Akta') dan untuk mengedar dadah *methamphetamine* 191.65g bertentanggan s 39B(1)(a) Akta. Perayu dalam pembelaannya mendakwa bahawa dia tiba di Sunday Hotel dengan kawan yang bernama Ah Chiang yang telah memandu kereta tersebut dan mengambil perayu sebelumnya di stesen bas Larkin. Perayu mendakwa bahawa apabila dia bangun keesokkan paginya, dia tidak dapat mencari Ah Chiang. Perayu kemudiannya memandu kereta tersebut untuk pergi bersarapan semasa dia ditahan. Perayu menafikan pengetahuan mengenai dadah tersebut. Pesuruhjaya kehakiman ('PK") memerintahkan bahawa cerita perayu mengenai 'Ah Chiang' semata-mata rekaan yang tidak disokong oleh keterangan. PK kemudiannya membuat dapatan fakta bahawa perayu

A mempunyai pengetahuan terhadap dadah tersebut. Mahkamah Tinggi oleh itu mendapati perayu bersalah terhadap kedua-dua tuduhan. Maka rayuan ini oleh perayu.

Diputuskan, menolak rayuan:

B (1) Membaca keterangan PW2, PW3 dan PW5's secara keseluruhan, mahkamah berpuas hati bahawa perayu telah dikenalpasti dengan sepenuhnya sebagai lelaki Cina yang tiba dengan kereta tersebut di Sunday Hotel, adalah orang yang sama meninggalkan hotel tersebut keesokkan harinya, kemudian memasuki kereta tersebut di mana dadah C tersebut diperolehi. Tidak ada alasan untuk tidak mempercayai PW2, PW3 dan PW5 (lihat perenggan 18).

(2) Perayu sebenarnya memiliki dadah yang diperolehi daripada kereta tersebut dan juga seperti yang diperolehi di dalam bilik No 201 Sunday D Hotel. PK juga betul dalam membuat kesimpulan bahawa perayu mempunyai pengetahuan mengenai dadah yang diperolehi daripada kereta tersebut dan daripada beg galas di dalam bilik hotel yang didudukinya. Penolakan hakim yang bijaksana terhadap cerita kehadiran kawan yang bernama Ah Chiang yang bersama dengan perayu pada E malam itu hanyalah rekaaan semata-mata, dalam keadaan ini, adalah betul (lihat perenggan 20).]

Notes

For cases on s 12(2) see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 296–301.
F For cases on s 39B1(a) see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

Legislation referred to

G Dangerous Drugs Act 1952 ss 12(2), 37(da), 39B(1)(a)

Appeal from: Criminal Appeal No 42–42 of 2005 (High Court, Kuala Lumpur)

Gooi Soon Seng (Tetuan Gooi & Azura) for the appellant.
H *Shoba a/p Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Zaleha Zahari JCA (delivering judgment of the court):

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[1] Two charges were preferred against the appellant in this case. Firstly, for possession of 6.58g of methamphetamine contrary to s 12(2) of the Dangerous Drugs Act 1952 ('the Act'); secondly, trafficking of 191.65g methamphetamine contrary to s 39B(1)(a) of the Act. The High Court found

the appellant guilty of both charges on 24 April 2009. In respect of the first charge, the appellant was sentenced to two years imprisonment and three strokes, whilst in respect of the second charge, the mandatory sentence of death was imposed upon him.

[2] We dismissed the appellant's appeal against the decision of the High Court against conviction and sentence in respect of both charges preferred against him for the following reasons.

[3] The evidence adduced by the prosecution was this. On 9 March 2005 at about 12 midnight Insp Norhisham bin Mustaphar ('PW3') received information about drug trafficking activities by a Chinese man at Jalan Bakawali 48, Taman Johor Jaya, Johor Bahru near Sunday Hotel using a Proton Waja registration No WJA 9290 ('the said car'). At about 12.30am, PW3, together with ASP Abdullah bin Mohamad ('PW2'), arrived at Sunday Hotel to carry out surveillance.

[4] Both PW2 and PW3 testified that at about 1am, a Proton Waja No WJA 9290 (the said car) drove up and parked the said car in front of Sunday Hotel. That a Chinese man in a dark shirt alighted from the said car, then went into Sunday Hotel carrying a brown sling bag with him.

[5] PW3 and his team continued their surveillance until 7am. At about 7am a Chinese man came out of the Sunday Hotel, entered the said car parked in front of Sunday Hotel. However, before the Chinese man could drive off, he was detained by the police.

[6] PW3 identified himself as a police officer, and asked the Chinese man (identified as accused ie the appellant) to open the door of the said car. PW3 carried out a body search on the appellant but did not find anything incriminating on him. The appellant appeared frightened. PW3 then carried out a search of the said car and found a package wrapped in newspaper (exh B P6A) under the steering dashboard of the said car. Upon opening the package in the presence of the appellant PW3 found that it contained five clear plastic packets (exhs P6A1–5) containing crystalline substance suspected to be syabu. PW3 then seized the exhibits and arrested the appellant.

[7] PW3 also recovered a key for room No 201 of Sunday Hotel from the appellant. The appellant was then brought to room No 201 of Sunday Hotel. The key retrieved from the appellant was then used to open room 201. There was no one in room No 201. The police carried out a search of the room in the presence of the appellant and three police officers. In room No 201, PW3 saw a brown sling bag (exh P8B) on the bed. Upon opening the brown sling bag, PW3 recovered a package wrapped in transparent plastic containing three

A transparent plastic packages (exhs P9A1–3) which in turn contained a crystalline powdery substances suspected to be syabu. The police found a receipt issued by Sunday Hotel in the name of the appellant from the sling bag (exh 9B). PW3 seized all of the said exhibits and brought the said exhibits and the appellant to his office, Jabatan Siasatan Jenayah Narkotik Johor Bahru.

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[8] Muhammad Yazid bin Ibrahim ('PW4'), the chemist, testified that the result of the tests carried out by him confirmed that the crystalline substances in exh P9 to be methaphetamine having a net weight of 6.58g, whilst in respect of exh P6, to be methamphetamine having a net weight of 191.65g (exh P17) the subject matter of the charges preferred against the appellant.

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[9] At the end of prosecution's case the judicial commissioner held that the prosecution had proved a prima facie case against the appellant and called upon him to enter his defence. We are of the view that based on the evidence adduced by the prosecution the learned trial judge was right in finding the prosecution had proved a prima facie case against the appellant and calling upon him to enter his defence.

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E **[10]** The appellant's defence was as follows: On 10 March 2005 at about 1am he arrived at Sunday Hotel with a friend Ah Chiang/Ah Keong in the said car. Ah Chiang was driving the said car, having picked him up earlier at Larkin bus station upon his arrival by bus from Kuala Lumpur to Johore Bahru. The purpose of coming to Johore Bahru was to look for prostitutes. At Ah Chiang's request they checked into the hotel under the appellant's name and occupied room No 201.

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[11] They did not find any prostitute that night. Both of them then went out for a meal. Upon returning to their hotel room, the appellant went to bed. On 10 March 2005 at 7am he woke up. Ah Chiang was not in the room. He tried to contact him trough his hand phone but was unsuccessful. He saw the car keys on a table and decided to take the said car to go for breakfast. He opened the door of the said car and was seated in the driver's seat when the said car was blocked by a car. Two Malay men alighted from the car which blocked his car, pointed a pistol in his direction and identified themselves as police.

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[12] The police ordered him to open the car door. He opened the car door and came out of the car. He was beaten up, handcuffed and ordered to squat beside the said car. The police then examined said car. A package was recovered from the said car and the police questioned him about it. The appellant said he had no knowledge of the package which was recovered, that he had not seen it before and that the car belonged to Ah Chiang. He was then taken to the hotel room No 201 Sunday Hotel which he was occupying. He was then shown a number of packages. He denied having any knowledge of the packages shown

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to him. He did not know from where the packages were recovered. The appellant had no knowledge of the contents of the packages recovered in room No 201 as well as in the said car.

FINDINGS OF THE HIGH COURT AT THE CONCLUSION OF THE CASE

[13] The learned judicial commissioner accepted the evidence of PW2, PW3 and PW5. The evidence of PW2 and PW3 was that the appellant had arrived alone in the said car and entered Sunday Hotel. The hotel receipt for the deposit paid was issued in the name of the appellant. That at about 7am the following day, the appellant came out of Sunday Hotel alone, approached the said car, entered it and was alone when the police apprehended him.

[14] The judicial commissioner rejected the defence story of the room being registered under the appellant's name at Ah Chiang's request as unlikely as the receipt was issued in the appellant's name, and nothing in room 201 indicating the presence of any other occupant apart from the appellant. The judicial commissioner then ruled that the appellant's story about 'Ah Chiang' is a mere fabrication unsupported by evidence. That it was but a desperate attempt on the appellant to shift the blame on a non existent person.

[15] The judicial commissioner then made a finding of fact that at the material time and place, the appellant had knowledge of the incriminating drugs recovered from the said car as well as the incriminating drugs recovered from the sling bag which he carried to the hotel room. Based on the evidence before him the judicial commissioner held that the appellant had not raised any reasonable doubt in his favour. Further, the appellant had also failed to rebut the presumption of trafficking under s 37(da) of the Act on a balance of probabilities. The judicial commissioner accordingly held that the prosecution had proved its case against the appellant beyond reasonable doubt to the charges preferred against him. He then found the appellant guilty, convicted him and sentenced him as stated in the earlier part of this judgment.

DECISION

[16] The issues raised in argument before us on appeal was threefold. We will deal with these issues in turn.

[17] The appellant's counsel submitted that the judicial commissioner erred by relying on hearsay evidence. He submitted that SP3's evidence relating to information received about drug trafficking activities by a Chinese man near Sunday Hotel using the said car was hearsay evidence. On this issue, upon perusing the grounds of decision we note that although the judicial

commissioner did make reference to this particular piece of evidence, his judgment however was based on the testimony of the police officers who had carried out the surveillance, which evidence was accordingly 'direct' and not 'hearsay' evidence. We are of the considered opinion that the appellant had not been prejudiced by reason of the reference to the information received which activated the police officers into action and to carry out the surveillance which they did, upon whose oral testimony the decision of the trial judge was clearly premised.

[18] It was then argued on behalf of the appellant that there was no evidence identifying the appellant as the Chinese man seen arriving at Sunday Hotel and that he was the same man seen leaving the said hotel the following morning and entering the said car. Upon appraisal of the evidence we are of the view that this argument is without basis and accordingly reject it. Reading PW2, PW3 and PW5's evidence as a whole, we are satisfied that the appellant has been sufficiently identified as the Chinese man arriving in the said car at the Sunday Hotel is the same person leaving the hotel the following morning, then entering the said car in which the drugs was recovered. There is no reason to disbelieve PW2, PW3 and PW5, for them to deliberately lie about what they observed at the scene of incident.

[19] Based on the evidence on record we are in agreement with the learned judicial commissioner's finding that the appellant was in actual possession of the drugs recovered from the fuse box compartment of the said car as well as that recovered in the room No 210 Sunday Hotel. In our considered view the judicial commissioner was right in arriving at the findings of fact which he did. The judicial commissioner was also right in inferring that the appellant had knowledge of the drugs recovered in the said car and that from the sling bag in the hotel room occupied by him.

[20] The learned judicial commissioner clearly had not invoked a double presumption as contended by the appellant's counsel. The learned judge's rejection of the story of the presence of a friend named Ah Chiang being together with the appellant that night to be a mere fabrication was, in these circumstances, correct.

[21] For the above reasons the appeal was dismissed and the decision of the judicial commissioner affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum